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Lawyers Committee On American Policy Towards Vietnam

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No. 3



REPORT

May 1968

(John S. Atlee, editor, this
issue)

A CLEARING HOUSE ON CHALLENGES TO THE LEGALITY OF U.S. INTERVENTION IN VIETNAM

Challenges to the legality of the Vietnam War have increased substantially in the past few months. The removal of graduate student and certain occupational deferments and the increased activity in the resistance movement will further increase the number of such actions. Present challenges involve not only draft cases but taxpayers' suits to recover unlawful expenditures, negligence actions for loss of life or property and injunction suits against draft boards. Litigation to free those who have gone to jail because they believe that this war is illegal will continue.

These actions provide an invaluable forum for establishing the clear illegality of the American intervention in Vietnam before the courts and before the bar of public opinion. This could make a significant contribution towards public understanding of the essential requirements for peace not only in Vietnam but in the broader arena of cold war conflict.

The Lawyers Committee on American Policy Towards Vietnam has recently been deluged with more requests in this matter than it can handle on an ad hoc basis. There is clearly an urgent need for a central **CLEARING HOUSE** for the kind of information and assistance required by lawyers and their clients. This Report is presented as a sort of "prospectus" in the hopes that it will help to stimulate the early establishment of such a Clearing House.

Page 2 is a partial listing of past and pending cases which have raised the illegality issue. It is presented mainly to suggest the various categories for which there is need for full and current information. For the David Mitchell case, we have given, as a sample, more of the kind of detailed information which the Clearing House would be expected to provide and which the questionnaire on pp. 3 and 4 is designed to elicit.

Page 5 gives other types of information or services, again in sample form, which have been requested by lawyers and their clients: bibliography, book and reprint service, "brief bank", "model" briefs and a list of organizations which provide related information or services — all of which might be included in a PRACTICE MANUAL, supplemented on a current basis by a REPORTER.

Your response (to pp. 3-4 and p. 6) will determine how soon and how effectively a Clearing House can be established.

Our Clearing House should furnish complete relevant information available in books, periodicals and newspapers. A partial list follows:

The Consultative Council of the Lawyers Committee on American Policy Towards Vietnam; Richard A. Falk, Chairman; John H.E. Fried, Rapporteur. **Vietnam and International Law: The Illegality of United States Military Involvement.** Flanders, New Jersey 07836: O'Hare Books, 1967. 168 pp., Cloth: \$4.00; Flexicloth: \$2.25. Analyzes violations of UN Charter and Geneva Accords of 1954, the U.S. "reprisals" against North Vietnam, the SEATO Treaty. Includes relevant excerpts from the documents and valuable footnote references to other materials.

Lawyers Committee on American Policy Towards Vietnam, "Memorandum of Law" (Inserted in *Congressional Record* Feb. 26, 1966, by Sen. Wayne Morse). Detailed analysis of illegality of US position under UN Charter, US Constitution and SEATO.

Falk, Richard (ed.), **The Vietnam War and International Law.** Princeton, University Press, 1968. Cloth: \$12.50, Paper: \$3.95.

Eberhard P. Deutch, "The Legality of the United States Position in Vietnam." *American Bar Association Journal*, May, 1966. p. 436.

William L. Standard, "United States Intervention in Vietnam Is Not Legal." *American Bar Association Journal*, July, 1966. p. 627.

Quincy Wright, "Legal Aspects of the Viet Nam Situation." *American Journal of International Law*, October, 1966. p. 740.

Barnet, Richard J., "The Last Act in Vietnam," *New York Times Sunday Magazine*, Feb. 4, 1968, p. 26.

Neill H. Atford, Jr., "The Legality of American Military Involvement In Vietnam: A Broader Perspective." *Yale Law Journal*, June, 1966. p. 1109.

Richard A. Falk, "International Law and the United States Role in the Viet Nam War." *Yale Law Journal*, June 1966. p. 1122.

John N. Moore, "International Law and the United States Role in Viet Nam: A Reply." *Yale Law Journal*, May, 1967. p. 1051.

Richard Falk, "International Law and the United States Role in Viet Nam: A Response to Professor Moore." *Idem*. p. 1095.

continued on page five

PAST AND PENDING LITIGATION

Citations below are among the more significant and widely publicized cases, classified by type of war resistance or situation involved. The Mitchell case is presented as a "sample" summary, the others merely listed.

I. Resistance to Vietnam Draft by Draft-age Men

1. Refusal to Register (total non-cooperation from outset)
2. Refusal of Induction—including refusal to take physical exam or other step towards induction; and refusal to perform alternative service (non-cooperation after registration).

*US v Mitchell (USSC) (363 F2d 323 US 972, 1042) 1961: Def. registered for draft; later notified local bd of disaffiliation. 1961-64, continued non-cooperation & inconclusive correspondence with bd. After refusing to report for induction on 1-11-65, was indicted. Def moved to dismiss under FRCrP Rule 12, arguing: (1) draft call constitutionally invalid because used for illegal purposes and under illegal conditions; (2) individual must disassociate himself from war crimes of his govt; (3) US committing crimes against peace; (4) US authorities and agents committing war crimes, crimes against humanity; (5) US violates treaties re war and self-determination.

At trial, 3-15-66 Def. moved to dismiss: draft is part of criminal policy in conflict with international law and moral responsibility. Def's refusal to be drafted constituted refusal to participate in criminal activity, for which he cannot be punished. DC denied motion. Ct. refused to allow Def. to testify and refused to hear testimony from witnesses, such as Staughton Lynd and Donald Duncan, charging the jury that such testimony was "irrelevant" and to decide only whether Def. reported for induction.

3-25-66: Def. convicted, 5 yrs.
12-66 CA 2 affirmed; 2-6-67 Def. jailed.
3-20-67 Def. denied cert, Douglas, J diss: Petition should be granted to answer sensitive, recurring questions; (1) whether Treaty of London is treaty within Art VI, cl 2; (2) whether question re waging aggressive "war" is justiciable question in this criminal case; (3) whether Vietnam episode is "war" in sense used in Treaty; (4) whether Def. has standing to raise question; (5) whether, if he has, it may be tendered as defense in criminal case or in amelioration of punishment.

3-12-68 CA2: denied appeal for reduction of sentence.

William Kunstler, Esq. 511 5th Ave, NYC;
Conrad J Lynn, Esq. 401 Broadway, NYC;
Fyke Farmer, Esq. 311 American Trust Bldg, Nashville, Tenn; Leonard Boudin, Esq. 30 E 42nd St, NYC; Mark Lane, Esq. 156 5th Ave, NYC; Robert L. Bobrick, Esq. 245 8th Ave, NYC.

*See p. 5, Brief Bank

Richmond and Von Key v Commanding Officer (CD Cal)
(12 RRLR 19) 10/13/66
US v Conklin (SD NY)
US v Oquendo (ED NY, #66 CR 326)
US v Weatherall (ND Ill, E Div, # 65 CR 534)
US v Hogans (CA 2, # 30,715)

3. Nonpossession of draft card
 - 3a. Returning of draft card
 - 3b. Burning of draft card

II. Other Resistance to the Draft

1. Adult support of draft resistance: ("advocating", "conspiring", etc.)
US v Coffin, et al, USDC, Dist of Massachusetts, Criminal number 68-1-F; pending.
2. Resistance of parent to drafting of son
Orr v US, Crown Pt. (Ind.) Draft Bd. (Crim Ct.)
Otsuka, 502 Calif 3
3. Other action to obstruct Selective Service System
US v Berrigan, USDC, Dist of Maryland, pending before Judge Northrop
Michigan v Brothman, Bloom (Ann Arbor) (USSC)

- ### III. Resistance by military personnel to service in Vietnam
- *Luftig v McNamara (USSC) (373 F2d 664; cd 387 US 945)
 - *Mora, Johnson, Samas v McNamara, Resor (CA DC, #1733-66)
Levy v Corcoran (USSC, #576)
US v Ciesielski (Navy Ct Martial, Norfolk)
Re Roger Newby (US Army, Ft. Monmouth)

- ### IV. Civilian support of servicemen's resistance to Vietnam service

- ### V. Direct action by civilians to obstruct military activity

- ### VI. Resistance to tax payments
- Autenrieth v US (ND Cal, #48025)

- ### VII. Against usurpation by President of power of Congress

- ### VIII. To recover personal damages
- Eminente v Pres Johnson, McNamara, Rusk (USSC) (361 F2d, cd 385 US 929)

- ### IX. Actions involving two or more types of resistance

- ### X. Other

QUESTIONNAIRE FOR INFORMATION ON CASES RAISING THE ISSUE OF THE ILLEGALITY OF THE WAR

Name, address, phone number of Attorney of Record

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Title of Case

Tribunal

Citation, docket, or index number

Full name of Client

Date Instituted

How Instituted

☐ action by client: ☐ class suit or ☐ individual suit.
☐ action against client

Type of war resistance or situation

I. Resistance to Vietnam draft, by draft-age man.

- ☐ Refusal to register
- ☐ Refusal of induction (or physical) or alternative
- ☐ Nonpossession of draft card
- ☐ Returning of draft card
- ☐ Burning draft card

II. Other Resistance to the Draft

- ☐ Adult support of draft resistance: ("advocating," "conspiring," etc.)
- ☐ Resistance of parent to drafting of son
- ☐ Other action to obstruct Selective Service System

III. Resistance by military personnel to service in Vietnam

- ☐ Refusal to go to Vietnam
- ☐ Other

IV. Civilian support of servicemen's resistance to Vietnam service.

V. Direct action by civilians to obstruct military activity

VI. Resistance to tax payments

- ☐ Telephone tax
- ☐ Income tax

VII. Against usurpation by President of power of Congress

VIII. To recover for war damage

- ☐ To person
- ☐ To property

IX. Actions involving two or more types of resistance

X. Other

Contentions regarding illegality

Under U. S. Constitution:

- ☐ Congress has sole power to "declare" war (Art I:8(11))
- ☐ The Tonkin Bay Joint Resolution (Pub Law 88-108, 78 Stat 384) was not a declaration of war.
- ☐ This Resolution did not authorize the war in Vietnam
- ☐ Even if it could be construed as authorization for war it was fraudulently obtained, and is therefore a nullity.
- ☐ War-making power was conferred on Congress only for defense (Preamble and Art I: 8(1))
- ☐ Treaties are part of the Supreme Law of the Land (Art VI: 2)
- ☐ Treaties are subject to adjudication by federal courts (Art III: 2)
- ☐ The President must see that the laws (including treaties) are faithfully executed.

Under Treaties Ratified by Congress

- ☐ The UN Charter (59 Stat 1031)
 - ☐ Prohibitions of use or threat of force to prevent self-determination (Arts. 2(4) and 1(2); Art 55 and 56)
 - ☐ Members must settle disputes by peaceful means (Art 2(3) and Art 33; Arts 2(4) and 1(1))
 - ☐ Determination of threat to peace, breach of peace or act of aggression is delegated exclusively to Security Council. (Art 39)
 - ☐ Art 51 (inherent right of individual or collective self-defense against armed attack) not applicable to U. S. actions in Vietnam.
- ☐ The Kellogg-Briand Pact of 1928 (46 Stat. 2343) (predecessor to UN Charter in prohibition of war as instrument of national policy.) Art I.
- ☐ 1949 Geneva ("Red Cross") Conventions on treatment of prisoners and civilians.
- ☐ SEATO Treaty (Preamble and Art I and IV)
 - ☐ (But SEATO treaty could not in any event be invoked to justify the US intervention: UN Charter Art 103)

Under Executive agreements, Unilateral Declarations and Assurances:

- ☐ Charter of International Military Tribunal (Treaty of London, Nuremberg Charter) 59 Stat 1544
 - ☐ Crimes against the peace (Art 6(a))
 - ☐ War crimes (Art 6(b))
 - ☐ Crimes against humanity (Art 6(c))
- ☐ UN affirmation of Nuremberg Law (UN Gen. Assembly Res. 95 (I) of 12/11/46.
- ☐ Charter of the International Military Tribunal for the Far East.

1954 Geneva Agreements on Vietnam— U.S. Unilateral Declaration not to use force or threat of force to disturb them:

- () Provision for 1956 elections to unify the two military regroupment zones (Art. 14(a) and Final Dec. par 7).
- () Affirmation of de jure unity of Vietnam and temporary nature of military demarcation line (Art. 1, and Final Dec. pars. 7, 11, 12).
- () Prohibition of reprisals against Vietminh supporters in Southern regroupment zone (Art. 14(c), Final Dec. par. 9).
- () Prohibition of introduction of additional or foreign troops, military equipment or bases (Arts. 16-19, Final Dec. pars. 4-5).
- () Atlantic Charter (wartime predecessor of UN Charter) (55 Stat 1600)

Under U.S. Statute Law

- () US Dept. of the Army, Army Field Manual No. 27-10, July 1956 (Nuremberg Law)

Other:
Basis for claiming judicial standing of client and judicial liability of legality issue:

- () Conscription or taxation for illegal purposes constitutes deprivation of life, liberty, property without due process of law. (US Constitution, 5th Amend)
- () Client has a legal duty to avoid complicity in war crimes— national under U.S. military law, supranational under Nuremberg law.
- () Under U.S. law an accused is assumed innocent until proven guilty: until legality of Vietnam intervention is decided affirmatively by the Supreme Court, conviction for principled resistance to it is denial of due process.

() Other

Main Government Arguments

- () A "political" question, not subject to judicial review
- () Client has no standing to sue
- () Legality of war "irrelevant"
- () Other

Form in which legality issue raised

Type of witnesses called for client

Name of Judge (specify particular hearing or motion)
.

() Was bail allowed? Amount?

Disposition of case?

Present status of case?

Are copies of briefs and motions available?
If so, may we have two copies of each for our proposed brief bank?

Could attorney and/or client supply related non-judicial information on the case (e.g. publicity, public support, and financing) if it seems appropriate for the Clearing House to compile such information.

Remarks:

Judicial Information and Practice

Ginger, Ann Fagan (ed.), **Civil Rights and Civil Liberties Handbook: Pleadings and Practice**. National Lawyers Guild, 1715 Francisco St., Berkeley, California 94703. A loose-leaf service. One section, the **Civil Liberties Docket**, gives citations and other information on cases filed since 1955, with those relevant to this Clearing House classified under "Conscientious Objection to War." Chronological steps in Selective Service Process: Function of lawyer, student deferments, COs in Armed Forces. pp 235: 1-134.

Tigar, Michael (ed.), **Selective Service Law Reporter**, 1029 Vermont Avenue, N.W., suite 508, Washington, D.C. Will publish a practice manual and a current reporter. The criminal section of the reporter, which is to be published in May, 1968, deals with refusal of induction, non-possession of draft cards, etc. (excludes injunction suits)

Central Committee for Conscientious Objectors (CCCCO), 2016 Walnut St., Philadelphia, 3, Pennsylvania. **Handbook for Conscientious Objectors** (1967). \$1.00. Contains much useful information on Selective Service Law and Practice.

Ginger, **The New Draft Law: Manual for lawyers and counselors**. National Lawyers Guild. 1967. \$10.00; (loose-leaf for law students \$5.00). Box 673, Berkeley, Calif. 94701. (exactly same text as in **CIVIL RIGHTS HANDBOOK** pp 235: 1-235: 134)

Counterdraft (monthly pub. for draft lawyers and counselors), 6324 Primrose Ave, Los Angeles 90028. \$1 plus contribution.

Bibliography, continued from page 1

Robert W. Kenny and William L. Standard, "The Question of the Legality of United States Action in Vietnam." **The Review of Contemporary Law**, International Association of Democratic Lawyers. Brussels, Belgium. November 2, 1966. p. 9.

General (Incomplete, of course)

Fall, Bernard, **The Two Viet-Nams: A Political and Military History**. New York, Praeger, 5th rev. ed., 1965.

Gettleman, Marvin E. (ed.), **Vietnam: History, Documents and Opinions on a Major World Crisis**. New York, Fawcett World Library, 1965.

Lacouture, Jean, **Vietnam: Between Two Truces**. New York, Random House, 1966.

BRIEF BANK

We hope to organize a Brief Bank that will be most effective in meeting your needs. As a starter, briefs in the actions starred on page 2 will be available from our office at minimal cost.

Organizations Providing Related Information

Or Services

Central Committee for Conscientious Objectors—20006 Walnut St., Phila., Pa. (215: 568-7971) Publishes **Handbook for C.O.'s** (see Bibliog) and monthly **News Notes** with information on current cases (mainly CO's but also conscientious resisters)

Resist—Room 4, 763 Massachusetts Ave., Cambridge, Mass. 02139 (617: 491-8076) Nat'l. organization for adult support of draft resisters. Newsletter has current information on the draft resistance movement, and trials of resisters.

Civil Liberties Legal Defense Fund, Inc.—94 Prescott St., Cambridge, Mass. 02138

National Lawyers Guild—Room 610, 5 Beekman St., N.Y.C., N.Y. 10038 (212: 227-1078)

National Emergency Civil Liberties Committee—25 E. 26 St., N.Y.C., N.Y. 10001 (212: 683-8120)

American Civil Liberties Union—156 5th Avenue, N.Y.C., N.Y. (212: 675-5990)

War Crimes (Treatment of prisoners, wounded, civilian populations, etc.)

Clergy and Laymen Concerned About Vietnam (Commissioned by), **In the Name of America**. New York, Clergy and Laymen Concerned About Vietnam, 1968. 420 pp., Cloth: \$4.95, Paper: \$2.95. Record of U. S. military conduct in Vietnam, as evidenced by published reports, "compared with the Laws of War binding on the U. S. Government and its citizens." Reprints the relevant sections from the Hague Conventions of 1907, Geneva "red cross" Conventions of 1949, "Nuremberg Principles," and U. S. Army Field Manual 27-10, July 1956.

1949 Geneva Convention text. Inserted by Senator Wayne Morse into Cong. Rec.—Sen, July 18, 1966, p. 15311.

Nazi Conspiracy and Aggression. Opinion and Judgment (Nuremberg) U. S. Govt. Printing Office, Washington, 1947.

REPLY BLANK

Name
 Address
 Telephone

1. Suggestions regarding the concept of the Clearing House:

- a) services it should provide

- b) administrative framework— who should operate it and
 how?

- c) organizational control and direction

2. Suggestions for next steps in establishing the Clearing House

- a) which organizations and individuals should be con-
 tacted for a meeting to set it up?

Our next REPORT will return to our other ongoing activities. It will discuss, amongst others, joint efforts between law schools and our Committee, the work of our Speakers Bureau, new memoranda based on the changing political scene and proposed conferences.

3. Are you in a position to do research? If so, in what capacity?

4. What would be the most appropriate way to finance the Clearing House?

5. Any other suggestions

6. I can personally contribute \$ in support of this project.

"On the whole question, it is impossible to improve on the words of the distinguished international lawyer John Bassett Moore, the author of *Moore's Digest*:

"There can hardly be room for doubt that the framers of the constitution, when they vested in Congress the power to declare war, never imagined they were leaving it to the executive to use the military and naval forces of the United States all over the world for the purpose of actually coercing other nations, occupying their territory, and killing their soldiers and citizens, all according to his own notions of the fitness of things, so long as he refrained from calling his action war or persisted in calling it peace."

Francis D. Wormuth, *"The Vietnam War: The President versus the Constitution"*, Center for the Study of Democratic Institutions, April, 1968, p. 35.

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